Supreme Court, U.S.
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No. 06-318

In the
Supreme Court of the United States

CATALINA ALTAMIRANO HERNANDEZ,
Petitioner,

v.

ALBERTO R. GONZALES, Attorney General,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the conflict among the federal circuits in regards to how to determine whether a state drug conviction qualifies as an aggravated felony under federal law counter Congress' intent to have uniform application of immigration laws?

2. Was Petitioner's state conviction properly classified as an aggravated felony under federal law?

3. Does a judgement by a state court, which pursuant to a state rehabilitative statute, withdraws a plea of guilty and enters a plea of not guilty (and dismisses the case in its entirety), eliminate the consequences of such conviction so as to make Petitioner eligible for treatment under the Federal First Offender Act?

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Catalina Altamirano-Hernandez (hereinafter "Ms. Altamirano" or "Petitioner") respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit dismissed the preceding petition for direct review on April 21, 2006. (Appendix[1] "A", *infra*, 3a.) On December 17, 2003, the Board of Immigration Appeals in the United States Department of Justice's Executive Office of Immigration Review (App. "B", *infra*, 4a), affirmed the opinion the decision of the Immigration Judge (App. "C", *infra*, 6a) originally entered on August 1, 2002.

JURISDICTION

The court of appeals entered its final judgment (i.e. denial of petition for rehearing) for docket number 04-70114 on April 21, 2006 (App. "A", *infra*, 1a) in an unreported decision and order. The preceding petition for review jurisdiction of the court of appeals invoked the jurisdiction of the court under 8 U.S.C. § 1252. The instant petition for writ of certiorari invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

INA § 240A(b), 8 U.S.C. § 1229b(b) reads, in pertinent part:

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[1] "Appendix" will hereinafter be referred to as "App.".

> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien an alien who is inadmissible or deportable from the United States if the alien–...
>
> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
> (B) has been a person of good moral character during such period;
> (C) *has not been convicted of an offense under section 212(a)(2), 237(a)(2)* . . . . (Emphasis added.)

Section 237(a)(2)(A)(iii) of the INA, 8 U.S.C. § 1227(a)(2)(A)(iii) provides in relevant part, "[a]ny alien who is convicted of an aggravated felony at ant time after admission is deportable."

In relation to the determination of an "aggravated felony", such includes "illicit *trafficking* in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." See INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B) (emphasis added). The term "drug trafficking crime" is defined as "any felony punishable under the Controlled Substances Act." 18 U.S.C. § 924(c)(2). In turn, the Controlled Substances Act defines the term "felony" as "any Federal or State offense classified by applicable Federal or State law as a felony." 21 U.S.C. §802(13). Finally, The Federal First Offenders Act allows a defendant to be released from penalties through expungement *if* the defendant has not been convicted under Federal or State law of a drug offense prior to the commission of this crime and is convicted of

simple possession. See 18 U.S.C. § 3607. The federal first offender exception does not apply to convicted aliens who are eligible for, but have not yet received, expungement of the conviction. See Chavez-Perez v. Ashcroft, 386 F.3d 1284, 1291 (9th Cir. 2004) (holding that removal order based on conviction that had not yet been expunged, did not violate equal protection).

STATEMENT OF THE CASE

The application of the sections for relief from removal proceedings contained in the Immigration and Nationality Act ("INA") affect thousands of immigrants each year in their quest to remain in the United States. Federal circuits below vary on the approach of how to analyze whether a state drug conviction qualifies as an aggravated felony under the INA creating a disjunctive approach to immigration laws that should be uniformly applied. Notwithstanding this issue, the Ninth Circuit has overlooked the true effect of a state rehabilitative statute which eliminates all the effects of a state conviction. This case thus raises the important questions as a state drug conviction's comport with federal law and regulations, sections that are frequently utilized in the Immigration Courts on a daily basis by thousands of immigrant each year.

A. PETITIONER AND HER CRIMINAL AND IMMIGRATION STATUS

Ms. Altamirano is a 50 year-old native and citizen of Mexico who entered the United States in January of 1971, and has remained continuously and physically in the United States since 1971. On January 29, 1986, she was convicted in the Superior Court of the State of California, in and for the County of San Diego, for the possession of heroin for sale in

violation of California Health and Safety Code ("CHSC") Section 11351[2]. (App. "D", *infra*, 25a-28a)

As a result of her conviction, Ms. Altamirano was placed on probation for three (3) years. On March 20, 1991, the conviction was expunged and completely eliminated as the guilty plea *withdrawn* and a plea of not guilty was entered in accordance with California Penal Code ("PC") Section 1203.4[3]. (App. "E", *infra*, 36a)

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[2] Cal. Health & Safety Code § 11351 reads, in pertinent part:

> Except as otherwise provided in this division, every person who possesses for sale or purchases for purposes of sale (1) any controlled substance specified in subdivision (b), (c), or (e) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, shall be punished by imprisonment in the state prison for two, three, or four years.

[3] Cal. Penal Code § 1203.4 states in part,

> (a) In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or had been discharged prior to the termination of the period of probation, or in any other case in which as court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the

B. PROCEEDINGS BELOW

Over ten years later on November 19, 2001, the Immigration and Naturalization Service ("Government") issued Ms. Altamirano a Notice o Appear ("NTA") charging her with removability under INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (present without being admitted or paroled). As relief from removal proceedings, Ms. Altamirano asserted eligibility for: (1) Adjustment of Status[4] under INA § 245(i), 8 U.S.C. 1255(i), (2) Cancellation of Removal under INA § 240A(b), 8 U.S.C. § 1229b(b), (3) Registry under INA § 249, 8 U.S.C. § 1259, and post-conclusion Voluntary Departure under INA § 240B(b), 8 U.S.C. § 1229c(b).

On August 1, 2002, Immigration Judge ("IJ") Gaylyn N. Boone held that Ms. Altamirano was not eligible for any of the forms of relief asserted. (App. "C", *infra*, 8a-10a.) The IJ held that because Ms. Altamirano's expunged conviction "does not fall under Matter of Manrique, [21 I & N Dec. 58 (BIA 1995)], as it was not one for simple possession at the state level and therefore the expungement has not affect on the issue of removability or eligibility for relief." (App. "C", *infra*, 8a-9a) (citing Matter of Yanez-Garcia, 23 I&N Dec. 390 (BIA 2002); United States v. Ibarra-Galindo, 206 F.3d 1337 (9th Cir. 2000), cert denied 531 U.S. 1102 (2001). Although the record clearly demonstrated that Petitioner's

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court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty.

[4] On May 26, 1995, Ms. Altamirano received an approved I-130 petition as a beneficiary sponsored by her U.S. Citizen son making her immediately eligible for an immigrant visa in accordance with the adjustment of status provision.

guilty plea was withdrawn and plea of not guilty was entered the IJ also reasoned that the fact that Ms. Altamirano's conviction was expunged pursuant to Cal. Penal Code Section 1203.4 does not preclude prosecution of its immigration consequences. (App. "C", *infra*, 9a) (citing Murillo-Espinoza v. INS, 261 F.3d 771 (9th Cir. 2001).

Furthermore, the IJ held that Ms. Altamirano's conviction under CHSC § 11351 constitutes a drug trafficking offense and therefore is an aggravated felony. (App. "C", *infra*, 9a) In making this determination, the IJ reasoned that the decision in United States v. Rivera-Sanchez is inapplicable to this case because CHSC § 11351 is not analogous to CHSC §§ 11352 or 11360 and does not punish conduct constituting "solicitation." (App. "C", *infra*, 9a)

Ms. Altamirano timely appealed with the Board of Immigration Appeals ("BIA"), and on December 17, 2003, the BIA affirmed the holding of the IJ on all accounts. (App. "B", *infra*, 4a-5a) Petitioner then timely petitioned the Ninth Circuit Court of Appeals for direct review, and was denied on April 21, 2006. (App. "A", *infra*, 3a). The Ninth Circuit reasoned that Petitioner's prior conviction constituted an aggravated felony in accordance with Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905 (9th Cir. Cal. 2004). (App. "A", *infra*, 2a.) Notwithstanding such determination, the court further held that Petitioner's expungement still remained a conviction by relying on additional precedent from Ramirez-Castro v. INS, 287 F.3d 1172 (9th Cir. 2002). (App. "A", *infra*, 2a-3a.)

REASONS FOR GRANTING THE PETITION

I. THE ISSUE PRESENTED IN THE CURRENT CASE REGARDING THE AGGRAVATED FELONY DETERMINATION IS IMPORTANT BECAUSE THERE IN CONFLICT AMONG THE CIRCUITS BELOW IN RELATION TO THE CASE LAW THE NINTH CIRCUIT RELIED UPON IN FINDING PETITIONER'S CONVICTION TO QUALIFY AS AN AGGRAVATED FELONY.

As described above, the Ninth Circuit relied upon its own precedent in a recent case, Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905 (9th Cir. Cal. 2004) in finding Petitioner's conviction to qualify as an aggravated felony. (App. "A", *infra*, 2a.) The court in Cazarez-Gutierrez recognized there was a *conflict* among the federal circuits in the aggravated felony determination in relation to state drug offenses. Id. at 910. The conflict was between (1) the Fifth Circuit, which holds a state offense that is a felony under state law but is punishable under the enumerated federal laws only as a misdemeanor is an aggravated felony for immigration purposes per United States v. Hernandez-Avalos, 251 F.3d 505 (5th Cir. 2001), and (2) the Second and Third Circuits who hold state felony drug offenses are not aggravated felonies for immigration purposes unless the offense contains a trafficking element or is punishable as a felony under the federal laws enumerated in 18 U.S.C. § 924(c)(2) per Gerbier v. Holmes, 280 F.3d 297 (3d Cir. 2002) and Aguirre v. INS, 79 F.3d 315 (2d Cir. 1996). Cazarez-Gutierrez, 382 F.3d at 914. Ultimately in Cazarez-Gutierrez, the Ninth Circuit determined "a state drug offense is an aggravated felony for immigration purposes only if it would be punishable as a felony under federal drug laws or the crime contains a

trafficking element" and sided with the Second and Third Circuits. Cazarez-Gutierrez, 382 F.3d at 914.

However, since the filing of Cazarez-Gutierrez, the case the Ninth Circuit relied upon in the current case, several other circuits have questioned the validity and approach of such case. For example, as concisely stated by Justice Nelson's concurrence in the majority holding in the Sixth Circuit case United States v. Palacios-Suarez, 418 F.3d 692 (6th Cir. 2005):

> No fewer than eight of our sister circuits have addressed the precise question presented in the case at bar. All eight have concluded that the term "a conviction for an aggravated felony," as used in U.S.S.G. § 2L1.2, includes a felony conviction in a state court for a drug offense that would be punishable only as a misdemeanor under the relevant federal statute...two of the eight circuits mentioned above have held in immigration cases that the language in § 924(c)(2) about "any felony punishable under the Controlled Substances Act" means, for immigration law purposes, punishable under the Controlled Substances Act as a felony -- which is not the meaning those circuits assign to the same language in the same statute for sentencing law purposes. Compare Aguirre v. INS, 79 F.3d 315, 317-18 (2d Cir. 1996), with Pornes-Garcia, and Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905, 919 (9th Cir. 2004), with Ibarra-Galindo. I agree with my colleagues on the panel that *the Second and Ninth Circuits have some explaining to do in this regard.* (There is no corresponding tension in the Third Circuit caselaw, since Gerbier v. Holmes, 280 F.3d 297 (3rd Cir. 2002) -- an immigration case reaching the same result

> as that reached in Aguirre and *Cazarez-Gutierrez* – stands alone in the Third Circuit; there is no Third Circuit sentencing case corresponding to the eight cases cited in the opening paragraph of this concurrence.)

Palacios-Suarez, 418 F.3d at 701-02 (emphasis added). In sum, "the Second, Third, and Ninth Circuits have adopted the Hypothetical Federal Felony approach espoused by the BIA in the Davis to K-V-D line of cases." See Gonzales-Gomez v. Achim, 372 F. Supp. 2d 1062, 1066 (D. Ill. 2005) (citing Cazarez- Gutierrez v. Ashcroft, 382 F.3d 905 (9th Cir. 2004); Gerbier v. Holmes, 280 F.3d 297 (3d Cir. 2002); Aguirre v. INS, 79 F.3d 315 (2d Cir. 1996)).

The *opposite* side of the spectrum (i.e the conflict), as in where the Fifth Circuit lies, is to disregard the "hypothetical federal felony approach" and find even a state misdemeanor conviction to qualify as an aggravated felony. See United States v. Hernandez-Avalos, 251 F.3d 505 (5th Cir. 2001). Obviously, there is a conflict among the circuits in how to approach the aggravated felony analysis relied upon by the Ninth Circuit in the present case. This is relevant because Petitioner then would potentially have different treatment based solely on geographic location. Coincidentally, it is this lack of uniformity among the circuit the Ninth Circuit attempted to counter act in Cazarez-Gutierrez in finding "immigration laws should be applied uniformly across the country, without regard to the nuances of state law" that actually exists by the court utilizing such decision in the present case. See Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905 at 913.

As such, the conflict among the circuits makes the issue presented in the case an important reason to grant the instant

petition. This lack of coherence among the circuits inevitably leads to an alien's disparate treatment in various geographic circuits. Also, as is well known, a lower federal court such as the BIA must following the holdings of higher federal courts such as the circuit Courts. A lack of coherence in the federal circuits described above logically could have the effect on confusion with the BIA, a tribunal responsible for hearing thousands of appeals each year. As such, the question presented in the current petition is sufficiently important for this Court to decide so as to create uniformity in the courts below.

II. IN MISINTERPRETING THE CALIFORNIA STATUTE WITHIN THE FEDERAL CONTEXT, THE DECISION BELOW IS INCORRECT AND CREATES A CONFLICT BETWEEN STATE AND FEDERAL LAW. USING THIS CONFLICT ADVERSELY AGAINST PETITIONER SO AS TO DEPRIVE HER OF RELIEF CONSTITUTED AN IMPERMISSIBLE DEPRIVATION OF DUE PROCESS.

It is well established legal principal in this Court that an alien in immigration proceedings is entitled to due process under the Fifth Amendment. See Marcello v. Bonds, 349 U.S. 302 (U.S. 1955) (citing Japanese Immigrant Case, 189 U.S. 86, 100 (U.S. 1903)) (An alien who is a resident of the United States cannot be deported without being accorded a fair hearing in accordance with the due process clause of the Fifth Amendment).

Petitioner sought cancellation of removal under INA § 240A(b), 8 U.S.C. § 1229b(b) which, as described above, requires the aline to not have been convicted of any aggravated felony. The only requirement at issue is whether

Petitioner has been convicted of an aggravated felony in relation to her conviction under CHSC § 11351. Here, as described above, the Ninth Circuit relied on Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905, 912 (9th Cir. 2004) to find that Petitioner's conviction constituted an aggravated felony. (App. "A", *infra*, 2a)

In general, the term "aggravated felony" includes "illicit *trafficking* in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." See INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B) (emphasis added).

The term "drug trafficking crime" is defined as "any felony punishable under the Controlled Substances Act." 18 U.S.C. § 924(c)(2). In turn, the Controlled Substances Act defines the term "felony" as "any Federal or State offense classified by applicable Federal or State law as a felony." 21 U.S.C. § 802(13). The BIA has determined "[b]ecause the meaning of the phrase 'drug trafficking crime' in 18 U.S.C. §924(c)(2) is a matter of *federal* criminal law, [the BIA] shall defer to the interpretation given that statute by the federal circuit courts of appeals." In re Yanez, 23 I&N Dec. 390 (BIA 2002) (emphasis added).

A. THE RELEVANT STATE STATUTE IS SO BROAD THAT IT PUNISHES CONDUCT THAT IS BOTH FELONIOUS *AND* NON-FELONIOUS UNDER FEDERAL LAW; AS A RESULT, VIOLATION OF THE STATE STATUTE CANNOT BE CONSIDERED TO BE THE COMMISSION OF AN AGGRAVATED FELONY.

Petitioner has not committed an aggravated felony under the principles laid out in United States v. Rivera-Sanchez, 247

F.3d 905 (9th Cir. 2001). In that case, the Ninth Circuit held that a conviction under California law for transporting, selling, importing, giving away, or otherwise importing a controlled substance into the state, does *not* qualify on its face as an "aggravated felony." Id.

The Rivera-Sanchez court examined the definition of "aggravated felony" under INA § 101(a)(43)(B), 8 U.S.C. §1101(a)(43)(B). In that case, the alien was convicted of violating California Health and Safety Code § 11360(a), or transporting, importing, selling, furnishing, administering, or giving away marijuana, or offering to do any of those acts. See CHSC § 11360(a).

The Court found that the statute was extremely broad, because it criminalized any number of acts, including acts that did not constitute a felony under the corresponding federal drug laws. Rivera-Sanchez, 247 F.3d at 908. According to federal statutory law, any offense punishable by a maximum term of imprisonment in excess of one year under the federal drug laws is considered a felony. See 18 U.S.C. § 3559(a)(5). Since some of the offenses under the California statute would not be punishable as felonies under the corresponding federal drug laws, it would be unfair to find that Rivera-Sanchez had committed an aggravated felony. Id. at 909.

In the current case, Petitioner is convicted of violating California Health and Safety Code § 11351. This code punishes anyone who "possesses for sale or purchases for purposes of sale" any number of controlled substances as defined in CHSC §§ 11054 and 11055, and any Schedule III, IV, or V substance. See CHSC § 11351. This code section states the punishment for violation is "imprisonment in the state prison for two, three, or four years." See CHSC

§ 11351. Because this statute calls for imprisonment of more than a year, a violation of it will result in a felony conviction.

However, not *all* of the behavior mentioned in CHSC § 11351 is considered felonious conduct under federal law. For example, the federal statute proscribes different punishments depending on the type of drug and the amount that is involved. 21 U.S.C. § 841(b)(3) makes the sale or possession of a Schedule V drug punishable by *less* than a year in prison; however, 21 U.S.C. § 841(b)(1)(a)(iii) states that an offense involving 50 grams of methamphetamine is punishable by no less than 10 years of prison. California Health and Safety Code § 11379 punishes *both* of those offenses with anywhere from three to nine years of imprisonment.

The California statute is therefore so broad that it classifies multiple types of offenses as felonies, even ones that are not felonies under 21 U.S.C. § 841.

B. THE IJ AND BIA COMMITTED CLEAR ERRORS OF LAW IN IGNORING THE APPLICABLE PRECEDENT IN PETITIONER'S REQUEST FOR RELIEF.

In her decision, the IJ states, "the respondent's conviction does not fall under Matter of Manrique, supra, as it was not one for simple possession at the state level and therefore the expungement has no affect on the issue of removability or eligibility for relief." (App. "C", *infra*, 8a-9a.) The IJ then cites as support for her conclusion, the BIA's decisions in Matter of Yanez-Garcia, 23 I&N Dec. 390 (BIA 2002) and United States v. Ibarra-Galindo, 206 F.3d 1337 (9th Cir. 2000), cert denied 531 U.S. 1102 (2001). However, these

decisions do *not* even discuss the Matter of Manrique test, let alone support the IJ's decision on this issue.

In Yanez-Garcia, the BIA was not faced with a respondent whose conviction had been expunged as in the present case. See generally Yanez-Garcia, 23 I&N Dec. at 393 ("[T]he question [is] whether state drug convictions classified as felonies under applicable state law, but not necessarily under federal law, constitute "drug trafficking crimes" under 18 U.S.C. § 924(c)(2), such that they may be considered aggravated felonies under section 101(a)(43)(B) of the Act."). Note that the issue at hand is whether Ms. Altamirano no longer stands "convicted" under Matter of Manrique, and under the subsequent development of the issue in Ninth Circuit case law. The only mentioning of this issue in Yanez-Garcia was a brief citation noting that the Ninth Circuit still follows the Matter of Manrique, 21 I. & N. Dec. 58 (BIA 1995). See Yanez-Garcia, 23 I&N Dec. at 411 ("Furthermore, we have made certain that a state prosecution for first-time simple possession of a controlled substance will not be construed as constituting an exception to that rule by overruling our prior decision in Matter of Manrique. . . Matter of Salazar, [23 I&N Dec. 223 (BIA 2002)]; Matter of Roldan-Santoyo, [23 I&N Dec. 512](BIA 1999), overruled in part by Lujan-Armendariz v. INS, 222 F.3d 728, 745-49 (9th Cir. 2000)."). Thus, the Yanez-Garcia decision does not support as a matter of law the IJ's finding that Ms. Altamirano's conviction does not fall under Matter of Manrique.

Likewise the IJ's citation to Ibarra-Galindo does not support her finding that as a matter of law Ms. Altamirano has no relief under Matter of Manrique. The issue in the Ibarra-Galindo opinion is "whether a state felony drug crime, which would not be a felony under federal law, nevertheless

may constitute an "aggravated felony" for purposes of enhancing a sentence for illegally reentering the United States." Ibarra-Galindo, 206 F.3d 1337 at 1338. The opinion does not address the availability of relief under Matter of Manrique for a respondent whose conviction was expunged and therefore does not support the IJ's finding regarding such eligibility.

Furthermore, the IJ erroneously cites to the Ninth Circuit's opinion in Murillo-Espinoza v. INS, 261 F.3d 771 (9th Cir. 2001) to support her finding that "[t]he fact that the respondent's conviction has been expunged pursuant to CPC § 1203.4, does not preclude prosecution of it's immigration consequences." (App. "C", *infra*, 9a.) The respondent in the Murillo-Espinoza decision was convicted in Arizona for violating a theft statute. Murillo-Espinoza, 261 F.3d 771 at 772. However, in the instant case, Ms. Altamirano had been convicted of violating a narcotic statute. Since the issue of Ms. Altamirano's eligibility under Matter of Manrique hinges on the fact that Congress specifically intended the Federal First Offender Act, 18 U.S.C. § 3607(a) ("FFOA") to remedy the overly harsh consequences of minor narcotic related crimes, Murilllo-Espinoza does not support the IJ's denial in the instant case. See Lujan, 222 F.3d 728 at 735 ("[T]he broad schemes for the rehabilitation of offenses under state law continued to serve as an important means of lessening the consequences of certain convictions, including avoiding deportations which would otherwise be excessively harsh."). Note also that the Ninth Circuit in Murillo-Espinoza ultimately ruled to not have jurisdiction and thus never fully reached the merits of that particular case.

C. PETITIONER WAS ELIGIBLE UNDER THE FEDERAL FIRST OFFENDER ACT AT THE TIME OF HER CONVICTION AND THEREFORE SHE IS CURRENTLY ELIGIBLE FOR THE ACT.

Ms. Altamirano would have been eligible under the Federal First Offender Act ("FFOA") at the time of her conviction if she had been prosecuted under federal law. In Manrique, the BIA held that an alien is not deportable if he can establish he had been eligible for the first offender treatment under federal law and thereby not stand "convicted" for the purposes of immigration law. Manrique, 21 I&N Dec. at 61. The rule prescribed in the FFOA has been applied to deportation cases regardless of whether the finding of guilt was obtained under the federal statute or under State law. See Lujan-Armendariz v. INS, 222 F.3d 728, 735 (9th Cir. 2000).

The Ninth Circuit has held that new definitions of "conviction" under AEDPA and IIRIRA would *not* repeal the FFOA. Id. at 737. Furthermore, the court has also has held that Manrique survives the passage of AEDPA and IIRIRA. See Cardenas-Uriarte v. INS, 227 F.3d 1132, n.4 (9th Cir. 2000).

In the present case, Ms. Altamirano was convicted on January 29, 1986, which is prior to the April 24, 1996 amendments by AEDPA and IIRIRA. Thus, Ms. Altamirano would be eligible under the FFOA if she shows that (1) she has been found guilty of simple possession of a controlled substance; (2) she has not, prior to the commission of such offense, been convicted of violating a federal or state law relating to controlled substances; (3) she has not previously been accorded first offender treatment under any law; and (4) the court has entered an order pursuant to a state rehabilitative

statute under which the criminal probation or proceedings have been or will be dismissed after probation. See Id. at 1136 (citing Manrique, supra).

D. PETITIONER NO LONGER STANDS CONVICTED BECAUSE SHE MEETS THE FIRST PRONG OF THE MANRIQUE TEST; HER CONVICTION WOULD BE PUNISHABLE UNDER 21 U.S.C. 844(A), POSSESSION OF A CONTROLLED SUBSTANCE UNDER FEDERAL LAW.

Petitioner meets the first prong of the Manrique test because her state conviction pursuant to H&S § 11351 (possession or purchase for sale of a controlled substance), was expunged pursuant to California Penal Code § 1203.4. In Manrique, the BIA noted that under "the provisions of 18 U.S.C. § 3607(a) (1988), a person is eligible for pre-judgment probation if (1) he is "found guilty of an offense described in section 404 of the Controlled Substances Act (21 U.S.C. § 844)," ie: simple possession of a controlled substance[.]" Manrique, 21 I&N Dec. at 64. The essence of the Manrique decision is that if the alien is a first offender guilty under a state statute for crime described as "simple possession" then "the policy of leniency in immigration proceedings shown to aliens subject to treatment under 18 U.S.C. § 3607 (a) (1988) will be extended[.]" See Id.

Petitioner meets the first prong of the Manrique test because her state conviction pursuant to section 11351, possession or purchase for sale of a controlled substance, is similar to section 11360(a) and should be punishable under federal law as a misdemeanor possession of a controlled substance, under 21 U.S.C. 844(a). CHSC § 11351 is a broad statute which not only punishes a full range of conduct,

but also punishes for possession of a wide range of narcotics including marijuana.

III. THE NINTH CIRCUIT'S RELIANCE ON ITS OWN PRECEDENT TO DISREGARD PETITIONER'S STATE EXPUNGEMENT OVERLOOKS THE ACTUAL SPECIFICS OF THAT CASE IN REGARDS TO THE RECORD BEFORE THE COURT IN THE PRESENT CASE.

As described above, the Ninth Circuit disregarded Ms. Altamirano's state conviction expungement under PC § 1203.4 in holding that a conviction expunged under that section still stands as a conviction for immigration purposes pursuant to controlling precedent in Ramirez-Castro v. INS, 287 F.3d 1172, 1175-76 (9th Cir. 2002). (App. "A", *infra*, 2a-3a.) In Ramirez-Castro, the Ninth Circuit specifically found

> assuming that some state expungement statutes could eliminate completely the immigration consequences of a state conviction, California Penal Code section 1203.4 is not such a statute. *That is so because it does not eliminate all consequences of a conviction even under California law*...California Penal Code section 1203.4(a) states that, upon expungement, a defendant "shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted, except as provided in Section 13555 of the Vehicle Code... California Vehicle Code section 13555, in turn, provides:
>
> > A termination of probation and dismissal of charges pursuant to Section 1203.4 ...of the Penal Code does not affect any revocation or suspension of the privilege of the person

> convicted to drive a motor vehicle under this chapter. Such person's prior conviction shall be considered a conviction for the purpose of revoking or suspending or otherwise limiting such privilege on the ground of two or more convictions.

Ramirez-Castro, 287 F.3d at 1175 (emphasis added). As such, the court apparently determined that if one's driving privileges were suspended pursuant to the state conviction, then such would still remain in effect even in the context of the grant of PC § 1203.4. The rationale apparently then was that an expungement under PC § 1203.4 does not, and cannot, eliminate *all* the consequences of a state conviction.

The application of the Ramirez-Castro rationale is improper when looking at the record of the whole in relation to the court's rationale described above. For example, the order granting Ms. Altamirano's clearly read

> Petition for relief pursuant to PC 1203.4 is granted. Defendant's previously entered guilty plea is *withdrawn*. *Not guilty plea entered and case is dismissed.*

(App. "E", *infra*, 39a.) (emphasis added). The fact that Petitioner is considered to now be "not guilty" could not be clearer in "eliminating all consequences of a conviction." See Ramirez-Castro, 287 F.3d at 1175. A person "not guilty" that has had his or her case "dismissed" means exactly what the terms read, namely that no conviction exists.

What is more, in relation to the Ramirez-Castro rationale that PC § 1203.4 does not eliminate the driving consequences per VC § 13555, such is *irrelevant* to the case at hand. The

support for this assertion stems from the fact that Petitioner's original conviction documents do not show her driving privileges were ever revoked in the first place. (App. "D", *infra*, 25a-35a.) Accordingly, the court's citation to this factor in Ramirez-Castro is null, and it is therefore reasonable to conclude *all* the consequences of her state conviction were eliminated by the grant of PC § 1203.4. As a result, the Ninth Circuit's use of Ramirez-Castro to find that Petitioner's state expungement still has immigration consequences is wrongly decided, and to further use such to deprive Petitioner of relief under the Federal First Offender Act is to deprive her of due process.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Murray D. Hilts, Esq.
Counsel of Record

Law Offices of Murray D. Hilts
3020 Meade Ave.
San Diego, CA 92116
(619) 688-1174
Counsel for Petitioner

DATED: August 31, 2006

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-70114
Agency No. A92-129-285

[Filed April 21, 2006]

CATALINA ALTAMIRANO HERNANDEZ, *Petitioner*,	)
v.	)
ALBERTO R. GONZALES, Attorney General, *Respondent*.	)

ON PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Submitted April 13, 2006**

Before: SILVERMAN, McKEOWN, and PAEZ, Circuit Judges.

Catalina Altamirano Hernandez, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' ("BIA") decision dismissing her appeal from an immigration judge's decision concluding that she was removable on the basis of an aggravated felony conviction. We have jurisdiction under 8 U.S.C. § 1252. We review legal questions de novo, *Castillo-Perez v. INS*, 212 F.3d 518, 523 (9th Cir. 2000), and deny the petition for review.

The BIA properly determined that a conviction for possession of heroin for sale under Cal. Health & Safety Code § 11351 is an aggravated felony in that it is punishable as a felony under federal law. *See Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 912 (9th Cir. 2004) (a state drug offense is an aggravated felony for immigration purposes only if it would be punishable as a felony under federal drug laws or if the crime contains a trafficking element). Hernandez's contention that she was eligible for relief from removal because her conviction was expunged under Cal. Penal Code § 1203.4 is unavailing because she was not convicted of simple possession, *see Dillingham v. INS*, 267 F.3d 996, 1005-07 (9th Cir. 2001) (an alien may not be deported where conviction for first-time simple possession of narcotics was expunged under state rehabilitative laws), and a conviction expunged under Section 1203.4 remains a conviction for

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** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

purposes of federal law, *see Ramirez-Castro v. INS*, 287 F.3d 1172, 1175-76 (9th Cir. 2002).

All remaining contentions are unpersuasive.

PETITION FOR REVIEW DENIED.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES IMMIGRATION COURT
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

File No. A92-129-285 - San Diego

[Filed December 17, 2003]

IN RE CATALINA ALTAMIRANO HERNANDEZ,	)
Respondent.	)
	)

IN REMOVAL PROCEEDINGS

ORDER

PER CURIAM. The appeal is dismissed. The Immigration Judge properly found that *Matter of Manrique,* 21 I&N Dec. 58 (BIA 1995), does not apply to the respondent because her conviction for possession of heroin with intent to sell under California law would not have rendered her eligible for federal first offender treatment (I.J. at 2-3). The Immigration Judge properly found that the respondent's conviction is not the same as a conviction for simple possession of a controlled substance, which is treated in a different section of the California Health and Safety Code and does not require the state to prove an intent to sell. *See* Cal. Health & Safety Code §§ 11350, 11351.

The Immigration Judge also properly found that the respondent has been convicted of an aggravated felony as defined in section 101 (a)(43)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101 (a)(43)(B) (I.J. at 3). The Immigration Judge properly distinguished *United States v. Rivera-Sanchez,* 247 F.3d 905 (9th Cir. 2001), which dealt with section 11360(a) of the California Health and Safety Code, an extremely broad provision that encompassed attempting and soliciting drug activity and that did not require the state to prove that the defendant possessed narcotics. The statute under which the respondent was convicted clearly requires the state to prove possession or purchase with an intent to sell and does not encompass attempt or solicitation. Therefore, the Immigration Judge correctly determined that the respondent is an alien convicted of an aggravated felony and is ineligible for the requested relief. Accordingly, the appeal is dismissed.

/s/

FOR THE BOARD OF IMMIGRATION APPEALS

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES IMMIGRATION COURT
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

File No. A92-129-285 - San Diego

[Filed August 1, 2002]

IN THE MATTER OF CATALINA ALTAMIRANO HERNANDEZ, *Respondent.*	))))

IN REMOVAL PROCEEDINGS

DECISION AND ORDER
OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Mexico. On November 19, 2001, the Immigration and Naturalization Service (Service) issued to the respondent a Notice to Appear (NTA) (Form 1-862) charging her with removability under section 212(a)(6)(A)(i) of the Immigration and Nationality Act (Act) as an alien who is present in the United States without being admitted or paroled. The Service alleges that on or about January 11, 1971, the respondent entered the United States at or near San Ysidro, California and was not then admitted or paroled. On December 20, 2001, the Service filed the charging documents with the San Diego Immigration

Court thereby vesting this Court with jurisdiction over these proceedings. *See* 8 C.F.R. § 3.14(a) (2002).

On April 18, 2002, the respondent appeared, with counsel, for her scheduled hearing. She admitted to the truth of all of the factual allegations, conceded removability, and indicated that she would seek relief in the form of adjustment of status, registry, cancellation of removal 'for certain nonpermanent residents under section 240A(b) of the Act, and post conclusion voluntary departure. The Service submitted a Record of Deportable/Inadmissible alien (Form I-213) and conviction documents relating to a December 23, 1985 conviction for violating California Health and Safety Code (CHSC) section 11351 for possession of heroin with intent to sell. The Court directed the respondent to file a preheating statement regarding her eligibility for relief no later than June 17, 2002. The Service was given until July 1, 2002 to respond. The hearing was continued until August 1, 2002.

On May 16, 2002, the respondent filed a prehearing statement in which she asserts that she is eligible for cancellation of removal under section 240A(b) of the Act and post conclusion voluntary departure as she no longer stands "convicted" of CHSC section 11351 under *Matter of Manrique,* 21 I&N Dec. 58 (BIA 1995) and has not been convicted of an aggravated felony under *United States v. Rivera-Sanchez,* 27 F.3d 905 (9th Cir. 2001). She also asserts her eligibility for adjustment of status through her United States citizen child and registry under section 249 of the Act. She argues that because her conviction has been expunged pursuant to California Penal Code (CPC) § 1203.4, it can no longer be used against her in these proceedings. She argues that she would have been eligible for treatment under the Federal First Offender Act as she meets all four prongs of the test outlined in *Matter of Manrique, supra.* She contends

CHSC § 11351 is similar to 11360 and that under federal law, her conviction would be a misdemeanor, punishable under 21 U.S.C. § 844(a), not felony drug trafficking under 18 U.S.C. § 924(c), and not an aggravated felony conviction under *United States v. Rivera-Sanchez, supra.* She further contends that she has not been previously convicted of violating a law relating to a controlled substance, has not previously been afforded first offender treatment, and, that her conviction has been expunged pursuant CPC § 1203.4.

As she does not stand "convicted" and therefore is not inadmissible under section 212(a)(2) of the Act and has not been convicted of an aggravated felony under section 101 (a)(43)(B) of the Act, she argues that she is eligible for adjustment of status, registry, cancellation of removal under section 240A(b) of the Act and voluntary departure. In support of her argument, the respondent provides a conviction document indicating that she has been granted relief under CPC § 1203.4 whereby her guilty plea was withdrawn, a not guilty plea was entered, and the case was dismissed.

On June 26, 2002, the Service filed a response arguing that the respondent is not eligible for relief from removal because she has been convicted of an aggravated felony and therefore is not eligible for a section 212(h) waiver or voluntary departure. The Service also argues that as she is inadmissible, she is not eligible for cancellation of removal under section 240A(b) of the Act.

Relief

The respondent asserts her eligibility for adjustment of status, registry, cancellation of removal and voluntary departure. The Court finds that the respondent's conviction does not fall under *Matter of Manrique, supra,* as it was not

one for simple possession at the state level and therefore the expungement has no affect on the issue of removability or eligibility for relief. *See Matter of Yanez-Garcia,* 23 I&N Dec. 390 (BIA 2002); *United States. v. Ibarra-Galindo;* 206 F.3d 1337 (9th Cir. 2000), *cert. denied* 531 U.S. 1102 (2001). The respondent was convicted of possession or purchase for sale for conduct that went well beyond "simple possession." The fact that the respondent's conviction has been expunged pursuant to CPC § 1203.4, does not preclude prosecution of its immigration consequences. *See Murillo-Espinoza v. INS,* 261 F.3d 771 (9th Cir. 2001).

Furthermore, the Court finds that the respondent has been convicted of an aggravated felony as defined is section 101(a)(43)(B) of the Act, a drug trafficking crime. CHSC Section 11351 is not analogous to CHSC §§ 11352 or 11360 and does not punish conduct constituting "solicitation." As such *United States v. Rivera-Sanchez, supra,* is inapplicable. CHSC § 11351 punishes the possession for sale or purchase for purposes of sale and therefore the respondent was convicted for conduct amounting to much more than an offer to sell or solicitation of a controlled substance. The respondent's conviction constitutes a drug trafficking offense as defined in section 101 (a)(43)(B) of the Act and therefore is an aggravated felony.

The respondent is inadmissible under section 212(a)(2)(A)(i)(II) of the Act. Furthermore, the respondent has been convicted of an aggravated felony as defined in section 101 (a)(43)(B) of the Act. As she is inadmissible under section 212(a)(2) of the Act she is not statutorily eligible to adjust her status under section 245 of the Act or for relief under section 240A(b) of the Act. Likewise, she is statutorily ineligible for a section 212(h) waiver of inadmissibility as her conviction does not relate to a single

offense of simple possession of 30 grams or less or marijuana and because subsequent to her previous admission for permanent residence on April 24, 1989, she has been convicted of an aggravated felony. *See* Form I-213. She is also not eligible for registry under section 249 of the Act because she is inadmissible under section 212(a)(2) of the Act. Lastly, the respondent is not eligible for post conclusion voluntary departure under section 242B(b) of the Act because she has been convicted of an aggravated felony. Accordingly, the Court enters the following order.

ORDER

IT IS ORDERED that the respondent's applications for adjustment of status, registry, cancellation of removal under section 240A(b) of the Act, and post conclusion voluntary departure are herein pretermitted as the respondent has been convicted of an aggravated felony;

IT IS FURTHER ORDERED that the respondent is ordered removed from the United States to Mexico.

/s/
GAYLYN N. BOONE
U.S. Immigration Judge

APPENDIX D

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO
NORTH COUNTY DIVISION

Case No. CRN10623

[Filed April 18, 2002]

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff,*	)
v.	)
CATALINA ALTAMIRANO MUNOZ, *Defendant.*	)

CASE FILE FOR
CATALINA ALTAMIRANO MUNOZ

This is to certify that the copies contained herein... are true and correct copies of the original documents on file in this case with the Clerk of the Superior Court, North County Judicial District, County of San Diego, State of California.

Date: 3/6/01 By: /s/ M. Plasencia
Deputy Clerk

MUNICIPAL COURT OF CALIFORNIA
COUNTY OF SAN DIEGO
NORTH COUNTY JUDICIAL DISTRICT

Case No. H18685
DA No. CRN 10623

[Filed January 14, 1986]

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff,*	)
v.	)
CATALINA ALTAMIRANO MUNOZ, *Defendant.*	)

FELONY PROCEEDINGS

The undersigned complains that in the County of San Diego, State of California, and before the making or filing of this complaint, Defendant(s) did commit the following crime(s):

COUNT FIVE: On or about 9/19/85, CATALINA ALTAMIRANO MUNOZ and JOSE JAIRO MUNOZ did unlawfully sell, furnish, administer, and give away, and offered to sell, furnish, administer, and give away controlled substances, in violation of Health and Safety Code section 11352. To wit: heroin.

COUNT SIX: On or about 9/19/85, CATALINA ALTAMIRANO MUNOZ did unlawfully possess controlled substances for sale, to wit: heroin, in violation of Health and Safety Code section 11351.

Subscribed and sworn to before me on
this date _____

_____
Judge of the Municipal Court, North
County Judicial District, County of
San Diego, State of California

I certify under penalty of perjury that the foregoing is true and correct. Executed at Vista, California on this date 9/24/95

/s/ Dave Harlon
Complainant
NTF/Ceb

* * * * * * * * * * * * * * * * * *

Deft FTA _____
B/F _____
AFF _____
Surety Demand _____
Comp/Warrant Ordered _____
Bail $ _____
Warrant Issued _____
Warrant Returned/Recalled ____
By _____

Deft appeared w/Atty Lynn Behegmer - arrg only (advised deft of constitutional rights), John Patterson - ret. DDA Bonnie Howard present for the People.

Reporter Lori Galindo, CSR. Deft duly arraigned and advised of all his constitutional rights as more fully set forth in the "Statement of Rights" form executed by deft and incorporated herein by reference _____. Reading of complaint and statement of rights waived yes.

Copy of complaint delivered to defendant yes.

Deft entered plea of NOT GUILTY √. Waived time: no Court finds deft is not financially able to retain counsel, attorney to be appointed.

Atty _____ appointed for future proceedings. Notified _____.

Deft ordered to appear _____ at _____ in Div. _____ and name attorney.

FOR _____
BOND/BAIL Cont. _____
Bail set $ 15,000.00
B/R _____ at _____, Div. _____

Bail Review and Readiness Conference set for 9/27/85 at 10:00 am, Div. 2.

Prelim. set for 10/4/85 at 8:30 am, Div. 2.

Bail Review Requested /s/
Commit-Pending Issued /s/
Release Issued _____

MUNICIPAL COURT
NORTH COUNTY JUDICIAL DISTRICT
COUNTY OF SAN DIEGO
STATE OF CALIFORNIA

Case No. H18685-1

[Filed January 15, 1986]

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff,*	)
v.	)
CATALINA ALTAMIRANO MUNOZ, *Defendant.*	)

CHANGE OF PLEA
(GUILTY)

Defendant to initial each item.

Comes now, Catalina Altamirano Munoz, defendant in the above-entitled criminal action, and in support of his motion to change his plea(s) to be made in open court personally and by his attorney, does declare:

1. That his attorney in the above-entitled criminal action is Larry W. Jones; /s/

2. That he is charged in complaint number H19685-1, with having violated H&S 11352, counts 1, 2, 4 & 5, H&S 11351, count 6; /s/

3. That he desires to change his plea(s) and desires to plead guilty to count 6, H&S 11351; /s/

4. That he is now and was as the time this form was prepared in possession of all his facilities and has not consumed any drug, narcotic, or alcoholic beverage in the 24-hour period preceding the entry of this plea to the extent that his sound judgment is impaired; /s/

5. That he does understand the nature of the charge(s) against him; /s/

6. That he has discussed the nature of the charge(s) against him and the possible defense(s) thereto with his attorney and understands the consequences of a plea of Guilty; /s/

7. That he violated the aforementioned H&S 11351 by possession of 5 grams heroin with the intent to sell. /s/

8. Defendant in this matter declares that he has been advised of the following constitutional rights:

   (a) The right to be tried by a jury;

   (b) The right to confront and to cross-examine all the witnesses against him;

   (c) The right at the trial to present evidence in

his favor and either to testify for himself or, if he wishes he may remain silent;

(d) The right to a speedy and public trial;

(e) The right to have witnesses subpoenaed to testify in his behalf without cost, and to obtain all evidence which might exonerate the defendant;

(f) The right to have a qualified lawyer defend him at all stages of the proceedings; that said attorney may be of defendant's own choice or shall be court appointed if the defendant is unable to afford counsel. /s/

8a. That he does except for his right to be represented by an attorney, voluntarily, knowingly, expressly, explicitly and intelligently waive each and every one of his rights as set forth in item 8 above, including:

(a) The right to be tried by jury;

(b) The right to confront and to cross-examine all the witnesses against him;

(c) The right against self-incrimination. /s/

9. That his decision to change his plea(s) has been made freely and voluntarily, without threat or fear to him or to anyone closely related to or associated with him; /s/

10. That his attorney has explained the possible

sentence(s), and the defendant understands the maximum punishment(s) which could be imposed as a result of a plea of Guilty to be: 4 years State Prison; /s/

11. That his attorney has explained the possible penalties and consequences of a plea of Guilty to be: Restitution of $550, up to 5 years on probation, up to 48 months on parole with up to 1 year return for parole violations. /s/

12. That he has not been induced to plead Guilty by any promise or representation of a lesser sentence, probation, reward, immunity, or anything else, except as stated below. If defendant's plea(s) of Guilty (is/are) the result of discussions with the Prosecutor, (e.g., that the Prosecutor has agreed to move to dismiss a count if defendant pleads Guilty to another count), explain briefly such promise or plea bargaining in the following space:
DA dismiss 1, 2, 4 & 5
Harvey Waller /s/

13. That he does understand that the matter of probation and sentence is to be determined solely by the court: /s/

Defendant has

1. ~~Personally prepared and discussed with his attorney~~.

2. Read, discussed, and has had explained to him by his attorney.

each of the above items, and understands same. Defendant has initialed each item as proof thereof.

Dated this 9 day of December, 1985.

/s/ Catalina Altamirano
Defendant's signature

Larry W. Jones states that he is the attorney for the defendant in the above-entitled criminal action; that he personally read, discussed and explained the contents of the above declaration of the defendant and each item thereof; that defendant's constitutional rights have not been violated; that no meritorious defense exists to the charge(s) to which defendant is Guilty; that he personally observed the defendant (~~fill in and initial each item~~, or read and initial each item) acknowledging explanation of the contents of each item; that he observed defendant date and sign said declaration; that he concurs in defendant's withdrawal of his plea(s) of not guilty; that he concurs in defendant's plea(s) of Guilty to the charge(s) as set forth by the defendant in the above declaration.

Dated this 9 day of December, 1985.

/s/ Larry W. Jones
Attorney's signature

The People of the State of California, plaintiff in the above-entitled action, by and through its attorney, the Prosecutor, concurs in the defendant's withdrawal of his plea(s) of not guilty and in the defendant's plea(s) of Guilty to

the charge(s) set forth by the defendant in the above declaration.

/s/ Michael P. Running
Deputy District Attorney
(Prosecutor)

Defendant personally and by his attorney, having in open court moved to withdraw his plea(s) of not guilty as heretofore entered and the People of the State of California, by and through its attorney, having concurred in said motion;

IT IS HEREBY ORDERED that said motion be and the same is hereby granted.

Dated: _____

/s/ Lester L. Jeager
Judge of the Magistrate Court

It is stipulated that the Court may consider the following as a factual basis for the plea: (1) the police report; (2) that the defendant was driving a motor vehicle on a public highway; (3) and that the result of the chemical analysis of defendant's blood/breath/urine (underline applicable test) was _____.

_____
Attorney for Defendant

_____
Deputy District Attorney
Prosecutor

MUNICIPAL COURT OF CALIFORNIA
COUNTY OF SAN DIEGO
NORTH COUNTY JUDICIAL DISTRICT

Case No. H18685-1
DA File No. A92044

[Filed January 15, 1986]

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff,*	)
v.	)
CATALINA ALTAMIRANO MUNOZ, *Defendant.*	)

FELONY PROCEEDINGS

DATE: 12-23-85

Deft. in Court with Atty. Larry Jones. DDA, Richard Sachs present for the People. Proceedings reported by C.S.R., Lori Galindo, CSR.

Deft. moved to withdraw plea of not guilty to the charges Motion granted, Not guilty plea set aside. Deft entered plea of GUILTY/~~NOLO CONTENDERE~~ to HS11351, felony charge(s).

Motion by the People to amend complaint by interlineation to add Count(s) _____ alleging violation(s) of section _____ in the statutory language. No objection by deft. Motion granted. Deft. waived arraignment, entered play of GUILTY/NOLO CONTENDERE as to _____, felony charge(s).

On People's motion by DDA Sach's, Count(s) 1, 2, 4, 5 are dismissed in the furtherance of justice, upon plea to Count(s) 6.

Deft. sworn and examined by the Court √; by DDA ___

___ Plea entered pursuant to People v. West.
√ Declaration and order re plea of GUILTY/~~NOLO CONTENDERE~~ filed.
___ Deft. states he is a U.S. Citizen.
√ Deft. states he is NOT a U.S. Citizen; therefore the Court advises:

If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

√ Deft. states he is not on Probation or Parole. Deft. advised Re: violation of Prob/Parole.

DEFENDANT STATED IN ANSWER TO THE COURT'S INQUIRY THAT: his constitutional rights had been explained to him by his counsel including his right to

trial by jury; his right to confront any witnesses; and his right not to become a witness against himself.

THE COURT FINDS THAT: the defendant understands his constitutional rights and the consequences of a plea of GUILTY/~~NOLO CONTENDERE~~; that he freely, voluntarily, expressly, explicitly and intelligently waives his right to trial by jury; yes; to confrontation of witnesses yes; against self-incrimination; yes; that he understands his is pleading GUILTY/~~NOLO CONTENDERE~~ is made freely and voluntarily without promise of hope of reward, probation, lesser sentence of immunity; yes; he is in fact guilty of the offense alleged; yes; and further the facts of the case as recited by the defendant fit the charge; yes.

Plea of GUILTY/~~NOLO CONTENDERE~~ accepted by the Court. Counsel joined in waiver; yes.

The defendant consents to the sentencing Judge considering the defendant's prior criminal history and the entire factual background of the case, including any unfiled, dismissed or stricken charges or allegations, and all underlying facts thereof, when granting probation or imposing sentence; yes. (Pursuant to People v. Harvey).

Yes Deft. waived his right pursuant to People v. Arbuckle.

___ Judge _____ to keep personal jurisdiction of this case at the request of the deft.

Yes Deft. waived time for sentence.

Deft. ordered to report to the Probation Department by [illegible in original] for interview and report: 325 S. Melrose Dr. Vista, Ca. 92083, 758-6724.

Deft. certified to the Superior Court and ordered to appear on 1-22-86 at 9:00 am, Division D for Probation Hearing and Sentencing.

Deft. ROR _____
BOND Cont. √
Bail as set $ _____
Bail reduced/increased to $ _____

___ Court requests Psychological evaluation pursuant to PC 1203h
___ Deft. has been scheduled to appear at the San Diego Courthouse Forensic Psychiatry for examination on _____.

COMMIT PENDING ISSUED ____
RELEASE ISSUED ____

/s/ Lester L. Jeager
Judge of the Municipal Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

CR Case No. CRN 10623
DA Case No. A9204401

[Filed January 29, 2986]

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff,*	)
v.	)
CATALINA ALTAMIRANO MUNOZ, *Defendant.*	)

SENTENCING HEARING

Date: 1-29-86, 9:00 am

BEFORE: Hon. Lawrence Kapiloff

Violation of HS11351-H

Defendant:

- ☐ Not present
- ☐ Arraigned for judgment
- ☐ Waives arraignment
- ☐ Defendant advised of rights and (admits/denies) a violation of probation
- ☐ Waives hearing

Probation is:

- ☐ Denied
- ☐ Revoked
- ☐ Reinstated
- ☐ Continued
- ☐ Modified
- ☒ Granted 3 years (formal/summary)

PROBATION:

- ☒ Imposition of sentence is suspended
- ☐ Defendant sentenced to state prison execution stayed(see below for terms)

Conditions of probation include, but are not limited to:

- ☒ Commitment to sheriff for 270 days
- ☐ Adult institutions recommended
- ☐ Parole not recommended
- ☒ Fine of $300 including penalty assessment at $50 per month commencing after start of restitution through Revenue and Recovery
- ☒ Restitution of ($800) $400 defendant's share to the Restitution fund at $50 per month commencing 60 days after release through Revenue and Recovery -- $800 jointly w/co-deft, Catalina's share to be paid is $400
- ☒ Restitution of $300 per GC 13967 stayed per PC 1202.4(b)
- ☐ Participation in community services program in lieu of restitution
- ☒ Fourth amendment waiver of person, auto, resident, personal effects
- ☒ Registration per PC, H&S 11590

STATE COMMIT:

- ☐ Defendant is committed to department of corrections for lower/middle/upper terms of ____ years (see below for additional counts)
- ☐ Defendant is committed to California Youth Authority
- ☐ Defendant is advised of appeal rights
- ☐ Defendant is advised regarding parole

CREDIT FOR TIME SERVED:

_7_ Days local
___Days State Prison
_3_ Days PC 4019
10 Total Days Credit

CUSTODY STATUS:

Defendant remains at liberty
- ☐ On bond posted $ _____
- ☐ On own recognizance
- ☐ On probation

Defendant remanded to custody
- ☒ Without bail
- ☐ with bail set at $ _____

- ☐ Defendant ordered released from custody

FUTURE HEARINGS:

- ☐ Defendant serves statutory time for pronouncement of judgment

☐ _____ continued to set for _____ a _____ in dept. _____ on motion of court DDA defendant probation officer.
Reason _____

☐ Defendant referred for diagnostic evaluation per PC 180303. Further hearing set for _____ at__ in dept. _____.

BONDS WARRANTS:

☐ Bench warrant to issue. Bail set at $ _____. Service withheld to _____.

☐ Bench warrant issued _____ is recalled.

☐ Bond forfeited. Bond amount _____. Bond no. _____. Bond company _____. Agent _____.

☒ Bond is exonerated.

MH:

☐ Proceedings suspended per PC 1368 mental competency (see below for dates of examination and hearing)

☐ [Illegible in original] addiction or danger of addiction (see below for date of service of petition and order)

OTHER:

☐ Referred to dept. of revenue and recovery

Spanish interpreter required. Irma Rosado Christ. NTF Agent Russ Oliver addresses the Court.

Dated: Jan. 29, 1986 /s/_____
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

CR Case No. CRN 10623

[Filed January 29, 2986]

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff,*	)
v.	)
CATALINA ALTAMIRANO MUNOZ, *Defendant.*	)

REPORT – INDETERMINATE SENTENCE, OTHER SENTENCE CHOICE

Dated: 1-29-86

Judge: Lawrence Kapiloff

1. Defendant was convicted of the violation of the following felonies:

   A. COUNT: 6
   CODE: H&S
   [Illegible in original]: 11351
   CRIME: POSS. NARC. CONTR. SUBST. FOR SALE
   YEAR CRIME WAS COMMITTED: 1985

DAYS OF CONVICTION: 12-23-85
CONVICTION BY: PLEA

2. A. Number of prior prison terms charged and found: None

   B. Number of prior felony convictions: None

3. ☐ Defendant was sentenced to death on counts ___.

4. ☐ Defendant was sentenced to State Prison.

   A. ☐ For life, or a term such as 15 or 25 years to life, with possibility of parole on counts ___.

   B. ☐ For life without the possibility of parole on counts ___.

   C. ☐ For other term proscribed by law on counts ___.

5. ☐ Counts _____ were deemed misdemeanors.

   A. ☐ Defendant sentenced to _____ Days in county jail for all counts.

6. ☒ For counts 6, the defendant was placed on probation.

   A. (1) ☐ Sentence pronounced and execution of sentence was suspended; or

      (2) ☒ Imposition of sentence was suspended.

B. Conditions of probation included

☒ Jail Time 270 days
☒ Fine

7. Other dispositions:

A. ☐ Defendant was committed to California Youth Authority.

B. ☐ Proceedings suspended, and defendant was committed to California Rehabilitation Center.

C. ☐ Proceedings suspended, and defendant was committed as a Mentally Disordered Sex Offender.

D. ☐ Proceedings suspended, and defendant was committed as mentally incompetent.

E. ☐ Other (Specify). _____.

Note: Pursuant to Article VI, Section 6 of the California Constitution and Section 68505 of the Government Code, the Chief Justice requires that each Superior Court shall complete this form for each indeterminate sentence to State Prison or sentence choice other than State Prison. The reports implement Section 1120.4 of the Penal Code and shall be mailed to administrative office of the courts, 360 McCallister, 3200 State Building, San Francisco, California 94102.

Date: January 29, 1986 /s/ J.A. Henry
Clerk

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

Case No. CRN 10623

[Filed January 23, 1986]

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff,*	)
v.	)
CATALINA ALTAMIRANO MUNOZ, *Defendant.*	)

PROBATION ORDER

The defendant having heretofore, on 12-23-85 been convicted of the crime of 11351 H&S Possession Narcotic/Controlled Substance for Sale as charged and set forth in (Complaint) entitled and numbered as above, filed in said Court by the District Attorney on 9-24-85 and this being the time fixed for pronouncing judgment upon the defendant, the People, appearing by _____. Deputy District Attorney and the defendant appearing in person and by Larry Jones, Attorney, and it appearing to the Court that the ends of justice will be served by placing said defendant upon probation;

IT IS THEREFORE NOW ORDERED by the Court that the (imposition) (execution) of sentence upon the defendant be and the same is hereby suspended for the term of three years from the date hereof during which time the defendant is committed to the charge and supervision of the Probation Officer of said County of San Diego and of this Court.

IT IS FURTHER ORDERED that said defendant wholly abstain from violating any of the laws of the United States, the State of California, and any of the ordinances of any municipality within this State, that defendant conduct self in all respects as a reputable and law-abiding citizen, that defendant not depart from the County of San Diego during said term of probation without the consent of the Probation Officer, not depart permanently from the State of California without the consent in writing of the Superior Court of San Diego County.

That said defendant report to the Probation Officer at such times and in such manner as directed and follow such course of conduct as may be prescribed by the Probation Officer.

1. Be committed to the custody of the Sheriff for 270 (270) days with credit for seven (7) actual days served and three (3) days 4019 PC credits; a total of ten (10) days credit.

2. Pay a fine of $300 (300), including penalty assessment, to the Probation Officer through Department of Revenue and Recovery at the rate of $50 (50) per month, commencing after payment of restitution.

3. Defendant, together with Jose J. Munoz (co-defendant) be jointly and severally responsible for

restitution of $800 (grand total); that the defendant's share be now set at $400 (total amount) to be paid to the Probation Officer through the Department of Revenue and Recovery at the rate of $50 per month, commencing 60 days after release from custody; said amount to the victims listed on page four (4) of the Probation Officer's report.

4. Pay a restitution fine pursuant to 13967 Government Code, in the amount of $300; further that it be stayed pursuant to 1202.4(b) PC with the stay to become permanent upon the successful completion of probation.

5. Not use or possess any controlled substance without a valid prescription and submit to testing for the use of controlled substances when required by the Probation Officer or other law enforcement officer.

6. Submit her person, property, place of residence, vehicle, personal effects to search at any time, with or without a search warrant, and with or without a reasonable cause when required to do so by the Probation Officer or any other law enforcement officer.

7. Register pursuant to: Section 11590 H&S Code (narcotics).

8. Violate no laws.

9. Report to Probation Officer within 72 hours of release from custody.

You are hereby informed that:

Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, shall at any time thereafter be permitted by the Court to withdraw his plea of guilty and enter a plea of not guilty, or if he has been convicted after a plea of not guilty, the Court shall set aside the verdict of guilty, and in either case the Court shall thereupon dismiss the accusation or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted.

Done in open Court: January 23, 1986

/s/ Lawrence Kapiloff
Judge of the Superior Court

APPENDIX E

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO**

Case No. CRN 10623

[Filed March 20, 1991]

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff,*	)
v.	)
CATALINA ALTAMIRANO MUNOZ, *Defendant.*	)

MOTION HEARING

BEFORE: Hon. Allan J. Preckel

Violation of HS11351-H

☒ DEFENDANT ~~NOT~~ PRESENT.

☐ NOT NEGOTIABLE.

- ☐ DEFENDANT WITHDRAWS ADVISED OF RIGHTS, WAIVES RIGHTS.

- ☐ DEFENDANT SWORN & EXAMINED DATE INFO FILED _____

- ☐ DEFENDANT WITHDRAWS HIS PLEA OF "NOT GUILTY" as heretofore entered. And now pleads

- ☐ NOLO CONTENDERE, with consent of DISTRICT ATTORNEY and approval of Court, of the offense

- ☐ GUILTY OF THE OFFENSE

- ☐ PEOPLE V. WEST PLEA

  As charged, Defendant makes application for probation, and hearing thereon and pronouncement of judgment is set for _____ at _____ in Dept. _____.

- ☐ Defendant's Motion to Dismiss pursuant to PC 995 is by the Court granted/denied/submitted

- ☐ Defendant's Motion to suppress evidence pursuant to PC 1538.5 is by the Court granted/denied/submitted

- ☐ On motion of _____ count(s) _____ is/are dismissed

- ☐ On motion of _____ alleged prior(s) _____ is/are stricken

☐ WAIVERS BY DEFENDANT:
( ) STATUTORY TIME: PRON. JUDGMENT/ TRIAL
( ) HARVEY/ARBUCKLE

Bail is set in the sum of $_____
Reduced to $_____

Defendant remanded to custody of sheriff:
- ☐ Without bail
- ☐ With bail set at $_____

Defendant is to remain at liberty:
- ☐ On own recognizance
- ☐ On bail previously posted. $_____

Defendant is ordered released from custody:
- ☐ On own recognizance
- ☐ Case dismissed

☐ This being the time set for _____ and Defendant not appearing. By the Court, a bench warrant issues with bail set at $_____ Service withheld to _____

☐ Bond is forfeited.
Amount $_____
Bonding company: _____
Local agent: _____
Bond No: _____

☐ Bond forfeiture of _____ is set aside.

☐ Additional plea of not guilty by reason of insanity entered by Defendant.

Psychiatrists Appointed: Dr. _____
and Dr. _____

☐ Defendant ordered to report immediately to Probation Department,
( ) 325 S. Melrose Dr., Vista
( ) 232 W. Ash St., San Diego for:
( ) Persistence Report
( ) Supplemental Report/Prob Rev _____
( ) PC 1000

☐ Defendant ordered to remain in this courtroom until interviewed by the probation resident court officer for a limited report.

☐ _____ is continued to _____
at _____ in Department _____.

Defendant is sworn and examined. Petition for relief pursuant to PC 1203.4 is granted. Defendant's previously entered guilty plea is withdrawn. Not guilty plea entered and case is dismissed.

Supreme Court, U.S.
FILED
DEC 6 - 2006
OFFICE OF THE CLERK

No. 06-318

In the Supreme Court of the United States

CATALINA ALTAMIRANO HERNANDEZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
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QUESTIONS PRESENTED

The Immigration and Nationality Act attaches a variety of consequences to an alien's conviction for an "aggravated felony." That Act defines "aggravated felony" to include "a drug trafficking crime (as defined in section 924(c) of title 18)"—which, in turn, defines the phrase to mean "any felony punishable under the Controlled Substances Act" (18 U.S.C. 924(c)(2))— "whether in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004). The questions presented are:

1. Whether petitioner's conviction for possessing heroin with the intent to sell it, which is a felony under both state and federal law, qualifies as an "aggravated felony" under the Immigration and Nationality Act.

2. Whether expungement of petitioner's conviction under state law affects its categorization as an "aggravated felony" under federal law.

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In the Supreme Court of the United States

No. 06-318

CATALINA ALTAMIRANO HERNANDEZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum decision of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter*, but is reprinted in 176 Fed. Appx. 896. The order of the Board of Immigration Appeals (Pet. App. 4a-5a) and the decision and order of the immigration judge (Pet. App. 6a-10a) are unreported.

JURISDICTION

The court of appeals entered its judgment on April 21, 2006. On July 7, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 4, 2006, and the petition was filed on August 31, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who is convicted of committing an "aggravated felony" within the meaning of that Act, 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004), may be ordered removed from the United States, 8 U.S.C. 1227(a)(2)(A)(iii). Conviction of an aggravated felony also limits the potential forms of relief from removal that are available to the alien.

The INA defines an "aggravated felony" by reference to a list of twenty-one categories of criminal offenses. Any offense "described in" that definition, "whether in violation of Federal or State law," is an aggravated felony. 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence). That definition of "aggravated felony" includes "illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. 1101(a)(43)(B). Section 924(c)(2) of Title 18, in turn, defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." Title 18 classifies a federal crime as a "felony" if "the maximum term of imprisonment authorized" exceeds one year. 18 U.S.C. 3559 (2000 & Supp. IV 2004).

2. Petitioner is a native and citizen of Mexico who entered the United States without being admitted or paroled. Pet. App. 2a, 6a. In December 1985, she was convicted in California state court of possessing five grams of heroin with the intent to sell it, which is a fel-

ony under state law that is punishable by up to four years of imprisonment. *Id.* at 16a-20a; Cal. Health & Safety Code § 11351 (West 1991 & Supp. 2006). She was sentenced to 270 days in jail, but that sentence was suspended and she was placed on probation for three years. Pet. App. 33a. Her conviction subsequently was expunged under state law. *Id.* at 2a.

The Immigration and Naturalization Service commenced removal proceedings against petitioner. Pet. App. 6a.[1] Petitioner conceded removability but sought relief from removal. *Id.* at 7a. The immigration judge ordered petitioner removed to Mexico. *Id.* at 6a-10a. The immigration judge found that petitioner was not eligible for relief from removal because her state-law drug conviction was an aggravated felony. *Id.* at 9a. In addition, the immigration judge held that the later expungement of petitioner's conviction did not render her eligible for relief because it was not a conviction for "simple possession." *Id.* at 8a-9a.

The Board of Immigration Appeals affirmed. Pet. App. 4a-5a. The Board held that petitioner's conviction was an aggravated felony because it "clearly requires the state to prove possession or purchase with an intent to sell." *Id.* at 5a. The Board also held that petitioner was not entitled to relief as a first offender because her conviction was not for simple possession. *Id.* at 4a.

3. The court of appeals affirmed in a brief, unpublished memorandum order. Pet. App. 1a-3a. The court agreed that petitioner's conviction for possession of heroin with the intent to sell was an aggravated felony be-

---

[1] The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. IV 2004).

cause it is "punishable as a felony under federal law," as well as state law. *Id.* at 2a. The court also held that expungement did not render petitioner eligible for relief from removal because a conviction expunged under state law "remains a conviction for purposes of federal law," and because her conviction was not for simple possession and therefore would not preserve her eligibility for relief under federal law. *Id.* at 2a-3a.

ARGUMENT

1. Petitioner seeks (Pet. 7-10) this Court's review of the court of appeals' determination that her conviction for possessing heroin with the intent to sell it is an aggravated felony. Petitioner relies (*ibid.*) on a circuit conflict on the question whether a controlled substance offense that is a felony under state law and that is punishable under the Controlled Substances Act, albeit generally only as a misdemeanor, is a "drug trafficking crime" within the meaning of the INA's definition of "aggravated felony," 8 U.S.C. 1101(a)(43)(B). On December 5, 2006, this Court held, in *Lopez* v. *Gonzales*, No. 05-547, that state-law felonies that would be punished as a misdemeanor under federal law are not "drug trafficking crimes" under the INA. That decision, however, is of no help to petitioner for two reasons.

First, because petitioner intended to sell the heroin that she possessed, her crime was an aggravated felony under the first clause of 8 U.S.C. 1101(a)(43)(B), as it involved "illicit trafficking in a controlled substance." See *Lopez*, slip op. at 4-5. Whether the crime was also a "drug trafficking crime" under 18 U.S.C. 924(c) is thus of no independent significance in this case.

Second, petitioner's crime—possessing heroin with the intent to sell it—is a felony under both federal and

state law. See 21 U.S.C. 841(a)(1) and (b)(1)(A)(i); 18 U.S.C. 3559(a); Pet. App. 2a, 18a. Her offense thus qualifies as a "drug trafficking crime" as this Court interpreted that phrase in *Lopez*. Slip op. at 12.[2]

2. Petitioner's argument (Pet. 13-20) that her offense is not an aggravated felony because it was expunged does not merit further review. Petitioner identifies no circuit conflict on that question. Moreover, petitioner's contention that a state-law expungement controls the federal immigration consequences of a conviction is wrong. See *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 111-112 (1983) (holding, under 18 U.S.C. 922, that "[w]hether one has been 'convicted' within the language of the gun control statutes is necessarily * * * a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State"); see *id.* at 113, 115 (where a federal statute requires only that the offense be "punishable" as a felony, "expunction under state law does not alter the historical fact of the conviction") (emphasis omitted).

Equally unavailing is petitioner's contention (Pet. 16-17) that her conviction does not qualify as an aggravated felony because of the Federal First Offender Act, 18 U.S.C. 3607. Putting aside the debatable proposition

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[2] Petitioner's argument (Pet. 10-13) that the court's decision conflicts with another Ninth Circuit decision, *United States* v. *Rivera-Sanchez*, 247 F.3d 905 (2001), is both wrong and beside the point. It is wrong because *Rivera-Sanchez* involved a different California law that criminalized drug offenses, some of which lacked any federal parallel. See Pet. App. 5a. It is also beside the point because this Court does not generally grant review to address intra-circuit conflicts, particularly when one of the allegedly conflicting decisions (the one in this case) is unpublished and thus non-precedential within the circuit.

that the Act governs the treatment of *state-law* offenses under the INA, petitioner would not qualify for relief by the plain terms of the statute, which extend only to persons found guilty of simple possession under 21 U.S.C. 844. Petitioner was not convicted of simple possession. Pet. App. 4a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

DECEMBER 2006